1954

Harry Alexander, Ralph H. Alexander and Evelyn Alexander Howick v. Zion's Savings Bank & Trust Company and Hanna Wilson Alexander : Petition for Rehearing and Brief in Support Thereof

Utah Supreme Court

John L. Black; Counsel for Respondents;

Case No. 8042

IN THE SUPREME COURT of the STATE OF UTAH

HARRY ALEXANDER, RALPH H. ALEXANDER and EVELYN ALEXANDER HOWICK,

Plaintiffs and Respondents,

— vs. —

ZION'S SAVINGS BANK & TRUST COMPANY, a corporation,

Defendant,

and

HANNAH WILSON ALEXANDER,

Defendant and Appellant.

PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF

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Salt Lake City, Utah

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PETITION FOR REHEARING

COME now HARRY ALEXANDER, RALPH H. ALEXANDER and EVELYN ALEXANDER HOWICK, respondents herein, and respectfully petition this

Honorable Court for a rehearing in the above-entitled case and to vacate the Order of this Court herein reversing the judgment entered thereon by the trial court.

This petition is based upon the following grounds:

POINT I.

The conclusion of this Court that the word "vest", as used in a typical spendthrift trust clause conclusively establishes that a trust agreement is testamentary is a proposition that has at no time been raised or argued by appellant either at the trial or on this appeal; therefore, the dictates of justice and respect for the trial court would seem to require that respondents be given the right to argue and submit authorities as to whether the spendthrift trust clause and particularly the word "vest" should be accorded the remarkable significance given it by this court in its opinion.

POINT II.

This Court should reconsider a decision which has defeated the intent of the settlor by an utter disregard of the clear purport of the trust instrument. Paragraph 5 of said instrument refers to "* * * interests * * * created hereby * * *." Yet this Court has declared that the settlor did not intend to create an interest thereby, and for that reason alone has defeated the trust agreement.

POINT III.

This Court has erroneously decided that the trust instrument must fail because the interest of the beneficiaries did not immediately *vest* in possession. The test this Court should have applied in determining validity of the trust agreement is whether or not said agreement bona fidely transferred a property interest from trustor to trustee.

Accompanying this Petition and filed herewith is a Brief in support hereof.

JOHN L. BLACK,
Attorney for Respondents
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Salt Lake City, Utah

CERTIFICATE OF COUNSEL

I hereby certify that I am the attorney for the respondents, petitioners herein, and that in my opinion there is good cause to believe the judgment objected to is erroneous and that the case ought to be re-examined as prayed for in said Petition.

DATED this ..... day of September, 1954.

JOHN L. BLACK

RECEIVED a copy of the foregoing Petition and Brief in support thereof this ..... day of September, 1954.

GRANT H. BAGLEY
D. EUGENE LIVINGSTON
DAVID E. SALISBURY

Attorneys for Defendant and Appellant

BRIEF IN SUPPORT OF PETITION FOR REHEARING

POINT I.

THE CONCLUSION OF THIS COURT THAT THE WORD "VEST", AS USED IN A TYPICAL SPENDTHRIFT TRUST CLAUSE CONCLUSIVELY ESTABLISHES THAT A TRUST AGREEMENT IS TESTAMENTARY IS A PROPOSITION THAT HAS AT NO TIME BEEN RAISED OR ARGUED BY APPELLANT EITHER AT THE TRIAL OR ON THIS APPEAL; THEREFORE, THE DICTATES OF JUSTICE AND RESPECT FOR THE TRIAL COURT WOULD SEEM TO REQUIRE THAT RESPONDENTS BE GIVEN THE RIGHT TO ARGUE AND SUBMIT AUTHORITIES AS TO WHETHER THE SPENDTHRIFT TRUST CLAUSE AND PARTICULARLY THE WORD "VEST" SHOULD BE ACCORDED THE REMARKABLE SIGNIFICANCE GIVEN IT BY THIS COURT IN ITS OPINION.

It can be ascertained from reading the Brief of Appellant that no contention was made that the trust in question was invalid for the reason stated in the opinion filed, i.e., that the spendthrift trust clause showed a specific intent that no right should vest in plaintiffs, at least until

the death of the surviving settlor. Inasmuch as this point was not urged in appellant's brief, respondents did not have the opportunity to meet such contention either by brief or by oral argument.

In the case of *People ex rel. Park Reservoir Co. v. Hinderlider et al.*, 98 Colo. 505, 57 P. 2d 894, the Supreme Court of Colorado reversed a judgment for reasons not assigned in any of the briefs or oral arguments of counsel. On Petition for Rehearing the Court held that defendants in error were entitled to a rehearing to argue the points on which the decision was based. The foregoing case is representative of the great weight of authority.

It is particularly fitting that respondents should be granted a rehearing in this case where the basis of this Court's opinion is unique in the field of trust law, and has the effect of making questionable spendthrift clauses in common use in most of the banking institutions of this state and by the legal profession generally.

POINT II.

THIS COURT SHOULD RECONSIDER A DECISION WHICH HAS DEFEATED THE INTENT OF THE SETTLOR BY AN UTTER DISREGARD OF THE CLEAR PURPORT OF THE TRUST INSTRUMENT. PARAGRAPH 5 OF SAID INSTRUMENT REFERS TO "* * * INTERESTS * * * CREATED HEREBY * * *." YET THIS COURT HAS DECLARED THAT THE SETTLOR DID NOT INTEND TO CREATE AN INTEREST THEREBY, AND FOR THAT REASON ALONE HAS DEFEATED THE TRUST AGREEMENT.

It can be seen from reading the Trust Agreement that according to the general scheme the trustors first described the trust fund and assigned and transferred it to the trustee; next, expressed the reservation of the rights of revocation and amendment and of changing beneficiaries; next, described how the residue and remainder of said trust fund should be distributed upon the death of the survivor in specifically designated shares to specifically designated beneficiaries; next, specified the powers of the trustee, and then included paragraph 5. By reading over paragraph 5 of the Trust Agreement it can easily be seen that this is a paragraph which is commonly called a "spendthrift trust" clause. Spendthrift trust clauses are ordinarily used for the purpose of protecting beneficiaries from creditors and also from their own tendency to anticipate any of the benefits before they are entitled to receive them. This paragraph was seized on by the court to invalidate the entire Trust Agreement as testamentary merely because the statement was made that "The respective interests of beneficiaries in the Trust Fund created hereby shall in no case vest in such beneficiaries until they, respectively, shall become entitled to receive and demand, absolutely and forthwith, the income or principal of the said Trust Fund to which they, respectively, may be entitled hereunder." Even at the beginning of the paragraph the trustors have spoken of the "respective interests of beneficiaries in the Trust Fund *created hereby*" and later on in the same paragraph it is stated, "* * * *the interests of said beneficiaries, and each of them,* either in the principal or the income shall

not be liable in any manner or to any extent for the obligations or liabilities, voluntary or involuntary, of the said beneficiaries, or either or any of them, of whatsoever character."

It is certainly an anomalous situation when the trustors have been so careful and meticulous about drawing up a Trust Agreement and specifying the beneficiaries and the respective shares of said beneficiaries in the trust fund and then added a clause for the express purpose of protecting said beneficiaries, to have the court hold that such clause indicates that the trustors intended that said beneficiaries have nothing more than a mere expectancy at the time of the creation of the trust. Furthermore, the wording, even in the spendthrift trust clause, specifically recognizes that said beneficiaries have an interest. It is respectfully submitted that the purpose of the spendthrift trust clause is to protect the interests of the beneficiaries and not to provide that said beneficiaries have no interest other than a mere expectancy. It is well known law that an expectancy is not assignable. See *Scott on Trusts,* Vol. 1, Sec. 86.1, where it is stated:

> "* * * It does not follow, however, that the expectant heir or legatee has before the death of the ancestor or testator such a property interest as can be presently assigned by him or made the subject of a trust."

If the settlors meant to give the beneficiaries nothing more than a mere expectancy, it is indeed strange that

they should then attempt to make this expectancy non-assignable when an expectancy is not assignable anyway. Furthermore, it is strange that they should attempt to place this expectancy in a trust when an expectancy cannot be made the subject of a trust.

Furthermore, in paragraph 3 of the Trust Agreement special provisions are made for the handling of the trust property after the death of the survivor of the trustors in case one or more of the two grandchildren are still under legal age. It is provided that if such is the case, the trustee, if it deems advisable, shall use its business discretion and provide proper care, support, maintenance and education for the minor grandchildren prior to said grandchildren coming of legal age, and it is further stated:

> "* * * In the event that either of said two grandchildren shall die before receiving the full portion of the Trust Fund to which he or she is entitled hereunder, the share of such deceased grandchild shall go to the surviving grandchild, if there be a survivor, and if not, then such share shall go to Harry Alexander, son of Trustor, or his then living heirs."

According to the language relied on by the court in paragraph 5, the respective interests in the beneficiaries shall in no case vest until said beneficiaries, respectively, shall become entitled to receive and demand absolutely and forthwith the income or principal of the said trust fund. It is submitted that according to the Trust Agree-

ment in case either one of the grandchildren are under age at the time of the death of the surviving trustor, that since the trustee is given discretion of whether or not to pay from their respective shares any money for his or her support, maintenance, care or education, that at that time said beneficiaries cannot absolutely demand any income or principal from the trust fund. Yet, paragraph 3 speaks of the trustee paying from the "respective shares" of the beneficiaries and also speaks of what should happen to said respective shares in case either of the two grandchildren shall die before receiving the full portion of the trust fund. This clearly indicates that the trustors recognized an immediate interest in the beneficiaries and certainly not a mere expectancy, as set forth by the court in its opinion.

In speaking of a similar type problem in determining vesting under the rule against perpetuities, it is stated in *Spendthrift Trusts,* 2nd Edition, by Erwin N. Griswold, par. 280.1:

> "There are some decisions to the effect that a spendthrift trust clause operates to keep the estate from vesting, and thus makes it invalid under the rule against perpetuities when it would otherwise be valid. There seems to be no basis on which such a conclusion can be supported. A mere restraint on alienation has nothing to do with 'vesting,' it relates only to the power to alienate the interest, and the question whether that interest is 'vested' or not depends on the contingencies that may affect the ultimate ownership of the interest — contingencies which do

not depend on the power of alienations. The presence or absence of the ordinary restraint on alienation should therefore have no bearing on the applicability of the rule against perpetuities."

And in Note 12 under par. 280.1:

"The Missouri cases cited in Note 10, above seem to be examples of this point, turning primarily on the form of spendthrift trust clause sometimes used in that state. The trust instruments in question not only expressly restrained alienation but also provided that 'no right or title to said income or other provision for any such beneficiary shall vest in him or her until the same shall have been actually paid into his or her hands.' In holding that the limitations of the trusts in question violated the rule against perpetuities the court took this clause literally. *But it would seem tolerably clear that the question of 'vesting' is a technical legal one which the settlor cannot control in this way. The court's difficulty here seems to come from the use of the word 'vest' in two distinct senses, one the technical one relevant to the rule against perpetuities, and the other synonymous with restraint on alienation. The restraint on 'vesting' imposed by the settlor did not qualify the beneficiaries' ownership of their interests; its only intended effect was to restrain alienation of those interests.* And such a restraint should have no bearing on the application of the rule against perpetuities."

This Court's opinion is precariously perched on a narrow and restrictive interpretation of the word "vest" in a spendthrift trust clause. This word has no mysteri-

ous power of solution in the case at bar. Its use and import has been the subject of discussion by outstanding authorities in the law of trusts.

For example, see the introduction to Chapter 8, *Cases and Materials on Future Interests,* by W. Barton Leech. In this introduction Professor Leech has listed four different meanings of the word "vested" existing in the law of future interests:

(1) A meaning of vested in possession.

(2) Vested in interest, meaning that although an interest is still a future interest, that it is not subject to a condition precedent other than the determination of the particular estate.

(3) Vested in the sense that if the named taker dies before it becomes possessory, the interest is transmissible to his estate and that his heirs or distributees will take the interest he would have taken had he lived; and finally,

(4) The meaning of the word "vest" where the Rule against Perpetuities is involved, an interest is vested when it has acquired the degree of certainty which, under the rule an interest must acquire within lives and being and 21 years or fail.

Certainly if the court is relying on the word "vest" as meaning vest in possession, then there would never be a valid gift over of a remainder in a trust because the

interest of the beneficiary in remainder in all such trusts does not vest in possession until after the death of the settlor.

If the court is relying on the meaning of "vest" as distinguished from "contingent" then respondents contend that the opinion is fallacious in that the interest of a beneficiary can certainly be "contingent" without causing the trust to be testamentary. In assuming a situation where a trust is admittedly not testamentary, Professor Scott in 43 *Harvard Law Review,* page 524 "Trusts and The Statute of Wills" states:

> "At the time of the conveyance the beneficiary acquires a future interest which may be vested or contingent."

POINT III.

THIS COURT HAS ERRONEOUSLY DECIDED THAT THE TRUST INSTRUMENT MUST FAIL BECAUSE THE INTEREST OF THE BENEFICIARIES DID NOT IMMEDIATELY *VEST* IN POSSESSION. THE TEST THIS COURT SHOULD HAVE APPLIED IN DETERMINING VALIDITY OF THE TRUST AGREEMENT IS WHETHER OR NOT SAID AGREEMENT BONA FIDELY TRANSFERRED A PROPERTY INTEREST FROM TRUSTOR TO TRUSTEE.

The court, in its opinion, has taken the "cart before the horse." The interest of the beneficiaries should result from the initial determination of whether or not the trust is valid according to the points argued in the briefs

on file. If it is determined that the trust is valid, then it would follow that the interest of the beneficiaries are "vested" if the court wishes to call it so.

The test as laid down by the cases and authorities on the subject as to whether or not a trust is testamentary is whether or not there is a valid transfer of the property from trustor to trustee. In other words whether the purported trust agreement is a valid deed or whether it is an attempted will. The authorities uniformly hold that there is no policy against disposing of property by means of a trust instead of a will. Professor Scott states at page 338, Vol. 1, *Scott on Trusts*:

> "It is sometimes suggested that a trust created inter vivos is invalid if it is made in lieu of a will. Such an objection is almost meaningless. Any trust whch is to continue after the death of the settlor must be created either inter vivos or by will, and if either form of disposition is employed it is used in lieu of the other. * * * It would seem, however, that the disposition is not to be condemned merely because the settlor elected to dispose of his property one way rather than in another."

In the present state of property law it is generally agreed that future interests can be conveyed. It is stated in 18 *Mich. L. R.* page 470, "When Are Deeds Testamentary?" by Henry W. Ballantine:

> "But in a majority of states the language that the deed is 'to be in force or take effect from and after the decease of the grantor', is inter-

> preted very liberally. * * * The probable intention is effectuated by holding the instrument operative in praesenti as a grant of future estate. * * * In view of the act of delivery to the grantee in the lifetime of the grantor, and the intention to be gathered from the whole transaction, the provision that 'title shall not pass until death,' does not mean that the grantee shall acquire no right or interest under the deed until the grantor's death. The deed conveys a vested interest to commence in futuro, and necessarily cuts down the estate remaining in the grantor."

And at 11 *A.L.R.* 36:

> "A deed may pass a present interest in property, the estate in which is a future one. One has an interest in property when he presently owns or holds some property rights therein, regardless of the time at which the estate comes into enjoyment."

Also, see *Venters v. Wickens* (1906), 224 Ill. 569, 79 N.E. 947, and *Jones v. Caird* (1913), 153 Wis. 384, 141 N.W. 228.

The ultimate question is whether the Trust Agreement in question was intended as a present conveyance from trustor to trustee, or whether it was meant to be a will. There can be no question but that the trustors meant this to be a present conveyance and the interest of the beneficiaries to be a present conveyance of a future estate, one to take effect in enjoyment and possession at a future time. If the trustors had intended a Will, certainly they would have created a Will. Besides, a Will

is ambulatory and revocable. This instrument was expressly made revocable and dealt with specifically designated property. It is stated in the case of *Jones v. Caird,* supra:

> "* * * it is a fair presumption that he intended something valid and effectual, rather than something void and useless."

It is stated in *Fonda v. Miller* (1951), 411 Ill. 74, 103 N.E. 2d 98:

> "Of great importance in our thinking on this subject is the long uninterrupted line of cases in this State holding that where there is a deed reserving a life estate in the grantor, there is a strong presumption that it is intended that the title should vest immediately in the remainderman, for the reason that if such intention had not existed there would be no reason for the reservation."

Of course, if the court holds that the settlor retained so much in the transaction that he actually conveyed nothing to the trustee, then there would be no trust. However, if the court holds that the settlor created what he purported to create, a trust with a conveyance of property to the trustee, then, whatever one may call the interest of the beneficiary is of no import. Then it is a real interest existing by reason of the trust and must be transferred to beneficiaries as provided in the trust.

The recent leading case of *National Shawmut Bank of Boston et al. v. Joy et al.,* (1944), 315 Mass. 457, 53

N.E. 2d 113, contains a very thorough discussion of the law involved in the case at bar. In that case the settlor created an intervivos trust of corporate stocks and bonds, reserving a life estate in himself, plus powers to revoke, alter or amend. After settlor's death, the trust provided for a life estate in one Sophia Brown and after her death the principal was to be paid over to such person or persons or corporations as the donor may appoint by an instrument duly acknowledged and under seal and deposited with the trustees, and in default of such appointment, to such persons as are entitled to settlor's property under intestacy laws. Settlor died without making an appointment.

The decision in the case expressly overruled the earlier Massachusetts case of *McEvoy v. Boston Five Cents Savings Bank,* 87 N.E. 465, and held that the trust was valid.

In a separate part of the opinion, the interest of the beneficiaries was discussed:

> "Until Nicholls died, his cousins (heirs under intestacy law) had not even what has been called a 'vested', or more properly a transmissible, interest in a contingent remainder * * * which interest arises where, except for the possible loss of the property through the exercise of an underlying power of appointment, the remainderman cannot fail to take if he lives until the time of vesting * * *, in a precise use of language the interest of the statutory next of kin was not a 'remainder' but was properly described as a future interest

> 'in the nature of an equitable remainder.' * * * But in current speech it was an equitable contingent remainder. * * * Even if the property had been realty, there would have been no need of tracing a fee into the settlor or his heirs while the contingency remained undetermined, as in legal estates at common law * * *, for the fact that the fee would be in the trustees would have satisfied all the feudal requirements of the common law. * * *
>
> "Equity has always recognized future and even executory * * * beneficial interests in realty or personalty without regard to common law technicalities, and even in favor of unascertained or unborn persons, subject however to the Rule against Perpetuities * * *. A trust is valid although the beneficiaries are left to be determined by the will of the settlor. * * * The selection of beneficiaries out of a class may be left to the trustee."

In the above cited case, the fact that the beneficiaries had no vested interest and were not even discernible at the time the trust was created, had nothing to do with the determination in a separate part of the opinion of whether the trust was real or illusory. The settlor in the case at bar couldn't possibly have intended to convey less of an interest to the beneficiaries specifically named, than the settlor in the *Joy* case did in giving his beneficiaries what was called *not even a vested interest in a contingent remainder.*

Another interesting case is *Van Cott v. Prentice and others* (1887), 104 N.Y. 45, 10 N.E. 257. In that case

the settlor delivered securities and an instrument to the trustee reserving the right of revocation and directing said trustee to pay the income to Clarence King for the use of three designated beneficiaries for life and to be disposed of at settlor's death in accordance with sealed instructions also delivered at that time to the trustees. The trust instrument specifically provided:

> "* * * and it is hereby declared and made a condition of these trusts that the beneficiaries thereof have no legal or equitable right to the principal or income of said securities or investments, but receive the same only as herein provided, as preceding solely from the bounty of said Prentice, and subject to his power to revoke the trusts hereby created."

Also, the trustee was to hold and manage the fund subject to the direction and control of the settlor. The court held that the trust was valid and not testamentary and stated in regard to the contention that the above provision made the trust testamentary:

> "The latter provision is plainly but an amplification of the idea involved in the power of revocation; for the grantor adds that the beneficiaries shall take what they receive as proceeding from his bounty, and subject to his right to revoke at any moment. * * * We ought not to put the creator of the trust in the attitude of deliberately nullifying his own evident purpose. That he meant to create an effective trust is beyond all question; *and a construction which makes him destroy the very effort to create should not prevail if there be any other rational interpretation.*"

It was also held in the *Van Cott* case that the sealed paper was to be read as part of the deed and was not testamentary.

In the *Van Cott* case, it can be seen that although the beneficiaries in remainder were not even known until after settlor's death when the sealed paper was opened, and in spite of the specific words to the effect that such beneficiaries had no legal or equitable right until they received their shares, the obvious intent of the settlor was carried out and these objections were brushed away as inconsequential.

The opinion of this Court has misconstrued both the *Joy* case and the *Van Cott* case.

A well known principle in trust law is the rule allowing a beneficiary to be ascertained by an act which has significance apart from its effect upon the disposition of the trust property. This is illustrated by the following at p. 332, Vol. 1, *Scott on Trusts*:

> "* * * as for example, where the settlor transfers property in trust to pay income to himself for life and to distribute the principal among persons in his employ at the time of his death."

In this situation the beneficiary cannot even be ascertained until after the death of the settlor and yet there seems to be no question in such a case of whether or not the beneficiary has a vested interest until after the death of the settlor.

The recent Utah case of *Thatcher et al. v. Merriman et al.*, (1952), ... Utah ....., 240 P. 2d 266, dealt with a decedent who assigned to defendants a promissory note retaining the right to receive all of the installments of principal paid on the note during assignor's lifetime. It was held by this Court that this constituted a present gift of such part of the principal as did not become due and was not paid during the lifetime of the assignor and therefore not invalid as a testamentary disposition.

The above cases and authorities establish very definitely that whether the beneficiaries' interest is deemed vested, contingent, or called any other name is not controlling in determining whether the trust in question is real or illusory. This question should be decided by determining whether or not there was a real transfer of property from trustor to trustee. If there was such a transfer then the interest of the beneficiaries will accordingly be determined to be a real interest and not a mere expectancy, whether it be deemed vested or contingent.

CONCLUSION

It is repectfully submitted that respondents should be granted a rehearing for the following reasons:

(1) Respondents have had no opportunity to argue before this Court the novel and unprecedented theory upon which this Court's opinion was based.

(2) This Court misconstrued the intent of the two settlors which is manifested time and again throughout the trust document, by taking out of context and meaning from the spendthrift clause the words "shall in no case vest". There is a specific intent to create real interests in the beneficiaries expressed even in the spendthrift clause itself. Furthermore, the word "vest" in a spendthrift clause has a meaning connected with restraint on alienation and has no significance with respect to creation of a property interest.

(3) This Court has attempted to solve the problem of whether the purported trust is real or illusory by fallaciously reasoning from effect to cause. The correct test should be to determine whether the transaction in question was real or illusory. The determination of this question will decide whether or not the beneficiaries have an interest in the property in question.

This Court's opinion is based on a narrow construction which has defeated the intent of the two settlors to dispose of their property in such a way that *their* heirs could eventually have it after the death of the survivor. The evolution of property law has been away from the strict, the technical, and the narrow, toward liberally attempting to allow persons to dispose of their property as they see fit.

This Court, by narrowly and strictly interpreting the trust instrument, has thwarted the intent of two elderly people to bestow upon their own descendants the bounty of their joint life's effort. It is our sincere hope that this Court will not allow such a gross miscarriage of justice to stand.

Respectfully submitted,

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Received ..... copies of the within Petition for Rehearing and Brief in Support Thereof this ..... day of September, 1954.

Attorneys for Defendant and Appellant